FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

vs.

PACIFICA FOUNDATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Brief Amicus Curiae of Writers Guild of America, West, Inc., in Support of Respondent.

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Pursuant to Rules 35 and 42(2) of the Rules of this Court, the Writers Guild of America, West, Inc. (sometimes referred to simply as "WGA" or "Guild"), respectfully files its Brief Amicus Curiae herein in support of Respondent (Pacifica Foundation). The written consents of all parties hereto are concurrently filed with the Clerk of the Court.

The Guild is the collective bargaining agent of writers employed by producers for the purpose of preparing literary material for entertainment motion pictures, television, and radio. The Guild has collective bargaining agreements with producers of films produced for or exhibited over television and with the three major radio

networks. It respectfully appears here to urge in behalf of writers that society's interest in permitting the fullest freedom to literary creativity requires that the Order of the Commission be reversed and the judgment of the Court of Appeals be affirmed.

I

To Forbid the Use of Words Is to Forbid the Expression of Ideas and Feelings.

The First Amendment and society's intellectual and emotional health require that there be no prohibited index of words. A writer creates only with words. To inhibit his choice of words inhibits his ideas and creativity and constricts the area of communication and expression in society. Indeed, words are the longest lived monuments and embodiments of the thoughts and feelings of mankind. They are the form in which the highest and lowest of human aspirations, ideas, and feelings have been preserved.

Words themselves, we submit, are chameleon in character, and unless they are used in an obscene work they are free to be used as the writer chooses.[1] His work endures, if it does, because he has preserved for others his ideas and feelings in such form and words that move readers or listeners to reread his works. It is precisely because words lie at the very center of the mysterious processes of creativity, communication, and understanding, and because they have a changing life of their own in the minds of men, that proscriptions of particular words cannot and should not be permitted in this society.

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[1]It is an obscene *work as a whole,* and not the individual words therein, which is not protected by the First Amendment. *Miller v. California* (1973) 413 U.S. 15, 24.

> "Scientists will have rifled the secrets of the moon and of Mars long before they will know the secret and subtle workings of the myriad minded force which shapes the course of language." John Moore, English novelist, You English Words, Lippincott, 1961, quoted in Contemporary Quotations, compiled by James B. Simpson, Galahad Books, New York, 1964, p. 357.

Even where the First Amendment has not been involved, this Court has recognized the living, changing character of words:

> "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense." Marshall, C.J., in *McCulloch v. Maryland* (1819), U.S.) 4 Wheat. 316, 414, 4 L. Ed. 579, 603.
>
> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary in color and content according to the circumstances and time in which it is used." Holmes, J., in *Towne v. Eisner* (1917) 245 U.S. 418, 425, 62 L. Ed. 372, 376.

Where the case has been fought on the terrain of the First Amendment, the Court has been more eloquent. It has recognized that words communicate ideas and emotions, and that the communication of both is and must be protected. "Fuck the Draft" has entered into our language, despite the expletive and despite the view of many that the four letter word should not be spoken. The reason is that "Fuck" in its pejorative sense was the appropriate word for the expression and communication of the utterer's ideas and feelings.

See Justice Harlan's language for the majority in *Cohen v. California*, 403 U.S. 15, 26 (1971), quoted at greater length in our Conclusion. As he states, "linguistic expression . . . conveys not only ideas . . . but otherwise inexpressible emotions as well. . . . We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."

II

It Is Impermissible for the FCC to Censor Material on the Ground of Content or to Discriminate on the Basis of "Taste".

We believe that the Carlin monologue, through satire and exaggeration, makes the very serious point that if an idea can be expressed "decently", it is irrational to condemn a word because that word is more pungent in expressing the same idea. John Locke long ago made a similar point this way:

> "We should have a great many fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for things themselves." An Essay Concerning Human Understanding (1690), 3.10.[2]

The Commission's reaction is to the words, and not to the ideas. The Commission analogizes to the law of nuisance and speaks of "a pigsty in an inappropriate place." (App. p. 14.)[3]

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[2]In the same essay, Locke wrote:

"Words, in their primary or immediate signification, stand for nothing but the ideas in the mind of him who uses them." 3.2.2.

[3]The Commission's language in its paragraph 11 is as follows: "11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by

We respectfully submit that it is constitutionally unseemly as well as flatly violative of the First Amendment to equate the principles which apply to free speech with those which govern property nuisances.[4] The *content* of expression is open to scrutiny only in cases of obscenity and defamation. In *Branzburg v. Hayes* (1972) 408 U.S. 665, where the Court refused to recognize an absolute privilege on the part of newsmen to withhold identity of confidential sources before grand juries, the Court stated:

> "Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such 'sham' newspapers would be easily distinguishable, yet *the First Amendment ordinarily*

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principles which are analogous to those found in cases relating to public nuisance. *Williams v. District of Columbia*, 136 U.S. App. D.C. 56, 419 F.2d 638 (*en banc* 1969); *Von Sleichter v. United States*, 153 U.S. App. D.C. 169, 472 F.2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. . ."

[4]The creative writer's reaction to censorship has been stated many times. Most recently, in the play "First Monday in October", by Robert E. Lee and Jerome Lawrence, two Justices of this Court who never lived except in the words and imagination of the writers and in the eyes and imagination of the audience, discuss whether obscenity is protected by the First Amendment:

> "Justice Loomis: Any outrage, any obscenity is permitted? Justice Snow: Censorship is an outrage. Censorship is an obscenity." (Act 1.)

This Court has not followed the absolutist First Amendment position of Justices Black and Douglas; it has held obscenity to be beyond the protection of the First Amendment. The case at bar, however, is naked censorship of "indecent" words where obscenity and prurient interest are not and cannot be found.

prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications *regardless of their* motivation, orthodoxy, truthfulness, timeliness or *taste.* [citations omitted] By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." (footnote 40, 408 U.S. at 705, 33 L. Ed. 2d at 653.)*

In short, it is impermissible to inquire into content and to discriminate on the basis of "taste." If a matter is not obscene, and the Commission concedes the Carlin material is not, then whether under a lesser standard the matter is "indecent" is a matter of "taste," and a governmental judgment thereon is prohibited.[5]

The Commission's order clearly violates the right of adult listeners (and also, we submit, of teenagers and other children) to hear a diversity of programs and flies in the face of 47 U.S.C. § 326, which provides:

"Nothing in this Act [The Communications Act of 1934] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted

*Emphasis has been added to quotations unless otherwise indicated.

[5]We also submit that there are constitutionally insurmountable difficulties to a governmental agency determining what is or is not "indecent" language and regulating communication on that basis. We respectfully suggest that of the seven words condemned by the Commission, two are probably not "indecent" in much if not most of our society today. We refer to "piss" and "tit", which we believe are respectively utilized substantially as frequently as "urine" and "breast". And certainly the connotation of some of the other proscribed words are wholly different in the ghetto than they are in the Commission's offices. It the Commission to become a Comstock committee which dry-cleans radio and television scripts?

by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."

III

The Commission's Authorities and Justifications for Its Order Will Not Withstand Analysis, Especially When Placed Against the Mandate of the First Amendment and the Prohibition Contained in 47 U.S.C. § 326.

1. The overwhelming majority of the cases upon which the Commission relies deal with obscene or erotic material or with appeals to prurient interest. See, *e.g., Sonderling Broadcasting Corp.,* 27 Pike & Fisher Rad. Reg. 2nd 285, rehearing denied, 41 F.C.C.2d 777 (1973), affirmed *sub nom. Illinois Citizens Committee v. F.C.C.,* 515 F.2d 397, rehearing denied, 515 F.2d 407 (D.C. Cir. 1975); *Young v. American Mini Theatres* (1976) 427 U.S. 50. The short answer to the attempt to use such cases as authority here is that ". . . it is now well established that obscene material is not protected by the First Amendment." *United States v. 12 200-Ft. Reels,* 413 U.S. 123, 126 (1973), citing *Roth v. United States,* 354 U.S. 476, 485 (1957) and *Miller v. California,* 413 U.S. 15, 23 (1972). But words which are thought by some to be "too strong" or "indecent" have not been banned from the language of discourse. "Fuck the Draft" may be paraded in the courthouse despite its vulgarity and offensiveness to some, and despite the presence of children.

Cases which are concerned with hard core pornography which does not have any serious literary, artistic, political or scientific value are simply not in point. The

Carlin record attacks the very concept that words alone can be indecent. In no sense can it be charged to be utterly without redeeming social value. It is protected speech, and no authority can be found to permit government censorship of it on the ground of taste or alleged "indecency" of words.[6]

2. The Commission argues that because there is a scarcity of spectrum space and because the Commission must license in the public interest, it may "channel" programs based on its standard of "indecency". The argument ignores the premises on which constitutionally valid FCC regulations may be based.

It is of course true that the right of access to the airways requires regulation by the FCC of some of the activities of broadcasters. The owners of radio stations may not escape their obligation to permit the use of the limited airways for the dissemination of views which they do not hold. Consequently the fairness doctrine and the FCC's "right of reply" rules are permissible regulations. The reason is that they are premised on insuring *diversity* of expression over the airways, *not upon censorship* of materials broadcast. In *Red Lion Broadcasting v. FCC* (1969) 395 U.S. 367, 389-390, Justice White stated for the Court:

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[6]A non-obscenity case on which the Commission relies is *Capitol Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.C. 1971), affirmed 405 U.S. 1000 (1973). That case simply does not deal with the problem at hand. It rests upon Congress' supervisory role over the federal regulatory agencies "or as an exercise of its power to regulate interstate commerce." (333 F.Supp. at 584.) Petitioner's speech was held not to be at issue in *Capitol Broadcasting Co.* (*Ibid.*)

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees *in favor of others* whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve *an uninhibited marketplace of ideas* in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (Citations omitted.)

3. The Commission states that it has relied on this Court's recognition that the parental interest in the "upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder* (1972) 406 U.S. 205, 213-214. But that is an emphasis on the parents' rights, not the government's. Further, the Commission's rule assumes that all parents (a) desire that the government regulate for them the content of radio programs, and (b) that all parents would be in favor

of a blanket prohibition of "indecent" material broadcast during daylight hours. These assumptions are unproven, and the order in fact would violate the rights of those parents who would not censor the material available during the day to listeners, including their own children.[7]

The farthest this Court has gone in time, place and manner of speech regulation is in *Young v. American Mini Theaters* (1976) 427 U.S. 50. There, the Court stated that a city's interest in planning and regulating the use of property for commercial purposes permitted restriction on place of exhibition of erotic films and material. That holding, however, does not reach this case, because admittedly, the materials broadcast were not erotic nor was the interest of a community in zoning regulation at issue.

Further, we respectfully submit that the principle set forth in *Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 213, vitiates the Commission's reasoning:

> "[s]peech that is neither obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."

[7]That the presence of children in the audience should not be determinative, is also shown, we submit, by the fact that no matter the time of a radio broadcast, there may always be children in the audience.

Conclusion.

August Strindberg said in his preface to Miss Julie (1888), "I see the playwright as a lay preacher peddling the ideas of his time in popular form." Both the ideas *and the form* are protected by the First Amendment.

Kingsley Corp. v. Regents of U. of N.Y. (1959) 360 U.S. 684, 688-689;[8]

Cohen v. California (1971) 403 U.S. 15.

The popular form that is peddled is language which is understood and which carries meaning and feeling. Of the words proscribed by the Commission, alternative words which express the same ideas would not be held "indecent". For a writer to say that a man has a bodily function, that he defecates and that he fornicates to procreate clearly cannot be prohibited. That he expresses the same idea in more pungent language does not make the thought or the expression less

[8]In *Kingsley* the Court stated:

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.
>
> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And *in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.*"

protected. That is one of the points attempted to be made by the Carlin monologue.

We return to Mr. Justice Harlan's language in *Cohen v. California* (1971) 403 U.S. 15, 26:

> ". . . much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but *the freedom to speak foolishly and without moderation*.' Baumgartner v. United States, 322 US 665, 673-674, 88 L Ed 1525, 1531, 64 S Ct 1240 (1944).
>
> Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results."

The Order of the Commission should be reversed and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1978.

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